Supreme Court, U.S.
FILED
AUG 18 2000
CLERK

(3)

No. 99-2029

In The

Supreme Court of the United States

BLUE SPRINGS FORD SALES, INC., BLUE SPRINGS FORD WHOLESALE OUTLET, ROBERT DUDLEY, FRED GRAHAM, DON ISOM,

Petitioners,

vs.

VICKI GRABINSKI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent Grabinski's brief does not seriously challenge petitioners' arguments that the Court of Appeals below, like other Circuits, has misapplied the Court's teachings on the degree of deference federal courts predicting state law should give to intermediate state appellate court opinions. Respondent instead tries to create the impression that these arguments somehow have not been preserved, or that the decision below does not implicate them. Neither position has merit.

Petitioners have fully preserved their arguments. They supported the District Court's discretionary determination not to separately award attorney's fees to Ms. Grabinski, even as it was effectively awarding her fees by entering what the District Court itself termed "overly generous" punitive damages (with full knowledge of her attorney's 50 percent contingency contract). App. D-4; B-20. Petitioners pointed below to the discretionary language of the Missouri statute and to Missouri caselaw supporting the fact that Missouri trial courts had discretion to refuse to award *any* fees in Merchandising Practices Act cases. Petitioners explained at length that, given the current state of Missouri law, the District Court could not possibly have abused its discretion in refusing to award fees. Petitioners specifically discussed the Missouri Court of Appeals' decision in *Carpenter v. Discount Motors, Inc.*, 652 S.W.2d 716 (Mo. Ct. App. 1983), where the state court, like the District Court here, expressly held that a complete denial of fees was within the trial court's discretion under Missouri law, especially where a generous damages award was already in place. *Id.* at 718; *see* App. B-16, B-18-19.

Respondent's claim (Brief in Opp., p. 1) that petitioners' rehearing petition did not incorporate their so-

called "core" argument about the Eighth Circuit's errors also lacks merit. Filing a rehearing petition is not a prerequisite to filing a certiorari petition, so it is difficult to see how any argument could be waived. The two petitions, of course, also serve quite different ends. In any event, petitioners did present their "core" argument below. Their rehearing petition highlighted in detail all three Missouri decisions[1] indicating that Missouri gives its trial judges wide discretion to refuse to award fees under the very statute in question. Petitioners told the Court of Appeals that it had given insufficient weight to those decisions, and argued extensively that there was *no* reason, much less a convincing or persuasive one, to depart from them. Petitioners cited two Eighth Circuit opinions that followed this Court's 1940 teachings in *West* and *Stoner*[2] that considerable weight should be given to intermediate state appellate decisions. *See Baxter Int'l, Inc. v. Morris*, 976 F.2d 1189, 1196 (8th Cir. 1992) (stating that "state appellate court decisions are highly persuasive and should be followed when they are the best evidence of state law") (citing *Aetna Casualty & Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707, 712-23 (8th Cir. 1992)). To imply that petitioners did not give the Court of Appeals an opportunity to correct its mistake is simply wrong.[3]

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[1] In addition to *Carpenter*, 652 S.W.2d at 717-18, petitioners cited *Sunset Pools of St. Louis v. Schaefer*, 869 S.W.2d 883 (Mo. Ct. App. 1994) as well as the Missouri Supreme Court's decision in *Kawin v. Chrysler Corp.*, 636 S.W.2d 40, 45 n.4 (Mo. banc 1982).

[2] *West v. AT&T*, 311 U.S. 223, 236-37 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940).

[3] Until the Court of Appeals' surprising decision to reject uniform Missouri authority, of course, there was no reason for petitioners to extensively brief the issue of the degree of deference to be afforded past Missouri decisions. Petitioners'

Nor are respondent's attempts to distinguish the clearly applicable Missouri decisions well-taken. Respondent suggests that because there are only three Missouri opinions addressing the exact question at issue – the award of attorney's fees under Mo. Rev. Stat. § 407.025.1 – this authority cannot be "uniform precedent." (Brief in Opp., p. 1). But there are *no* apposite cases supporting the Court of Appeals' "prediction." Although respondent suggests the Missouri Court of Appeals' critical holding in *Carpenter* is dictum (Brief in Opp., p. 2), even the Eighth Circuit did not go that far.[4] The fact remains that, dictum or not, *Carpenter's* discussion of the exact issue faced by the courts below is by far the best expression of Missouri law.

The two cases respondent cites[5] as supposed authority for Missouri courts' inclination to follow federal precedent are not persuasive. Both cases involved a different Missouri statute that, like the statute in *O'Brien*[6] relied on by the Court of Appeals, *requires* attorney's fees awards.[7]

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brief on the merits in the Court of Appeals nevertheless spent several pages discussing the *Erie* doctrine and principles of federalism, which petitioners correctly argued required the Court of Appeals in the circumstances of this diversity case to follow existing Missouri law.

[4] The Eighth Circuit instead suggested only that *Carpenter's* discussion of the Missouri statute was an "alternative holding" that "approached" dictum. App. A-6.

[5] *Melahn v. Otto*, 836 S.W.2d 525 (Mo. App. 1992) and *Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W.2d 894 (Mo. App. 1997) (Brief in Opp., p. 2).

[6] *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64 (Mo. 1989).

[7] The statute at issue in both *Melahn* and *Hernandez*, like the *O'Brien* statute, states that attorney's fees "shall" be awarded to the prevailing party. *See* Mo. Rev. Stat. 536.087; *compare* Mo. Rev.

One of respondent's cases concerned the definition of "prevailing party," and turned to federal law only after noting both that there was no Missouri authority and also that the Missouri statute in question was "patterned after" a federal law. *Melahn*, 836 S.W.2d at 527. The second case actually denied all fees in spite of the mandatory language of the statute! *Hernandez*, 936 S.W.2d at 905.

In short, no Missouri court has even hinted that attorney's fees under the Missouri Merchandising Practices Act should be anything other than "discretionary" as that term is commonly understood. *See* Debra E. Wax, Annotation, *Award of Attorneys' Fees in Actions Under State Deceptive Trade Practice and Consumer Protection Acts*, 35 A.L.R. 4th 12, 28-31 (1985 and Supp. 2000) (citing *Kawin* and *Carpenter*, and characterizing Missouri as one of the "discretionary" rather than "mandatory" states with respect to attorney's fees awards under its Merchandising Practices Act). Far from implying that such discretionary fee awards are effectively mandatory, two separate Missouri intermediate state appellate courts, the Western District Court of Appeals in *Carpenter* and the Eastern District in *Sunset Pools*, both refused to award *any* fees under that very statute. These holdings plainly show that the Eighth Circuit's "prediction" that Missouri would incorporate federal civil rights standards into its Merchandising Practices Act fee awards has no basis in fact. This fanciful "prediction" at a minimum lacks the "convincing evidence" and "persuasive data" this Court's decisions require to overcome existing Missouri law. *See*

Stat. § 407.546 (the *O'Brien* statute) (stating that an unsuccessful defendant "shall" be liable for attorney's fees) *with* Mo. Rev. Stat. § 407.025.1 (the statute at issue below) (stating merely that the Court "may, in its discretion" award fees).

Stoner, 311 U.S. at 467; *West*, 311 U.S. at 237. The Court of Appeals' decision below, and petitioners' examples of the widely varying standards used in other Circuits (Pet. at 8-9), thus directly raise the question presented by the petition.

This case presents an important issue of federalism. Despite existing Missouri caselaw, and the District Court's view that Missouri courts may be "somewhat more cautious than one finds in federal fee awards"(App. D-3), the Court of Appeals simply imported wholesale the liberal fee standards used in federal civil rights cases. And similar confusion in other Circuits appears widespread. The Court should grant certiorari to more fully explain the circumstances in which federal courts may ignore existing state intermediate appellate court opinions in predicting state law. In the alternative, if the Court does not consider this case appropriate for certiorari, it may still wish to consider granting the petition, vacating the Court of Appeals' opinion, and remanding with instructions to affirm the District Court's discretionary decision not to award attorney's fees.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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